Well, what would you do? Reflections on the need for a theory of bankruptcy law

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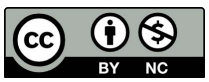

Well, what would you do? Reflections on the need for a theory of bankruptcy law

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Bankruptcy law in England and Wales has no underpinning written theory, being driven by commercial and political imperatives. Bankruptcy laws elsewhere suggest that if we drew up bankruptcy law from scratch, the law would neither be inconvenienced by the lack of theory nor very different from current practice.

There is no written theory of English and Welsh bankruptcy law, and, says Dr John Tribe of Liverpool University, there ought to be.[1] This article is both a celebration of his article and a critique of parts of it. His article is particularly to be commended for its thoughtful and well-informed views on why there is so little research on the law of bankruptcy, and so little engagement within the legal profession with an underlying theory of bankruptcy.

In response to Tribe's article, Stubbins attempted to establish a sense of direction which could be applied to future English bankruptcy law, instead of the pragmatic and piecemeal

[1] Tribe "Why the theory of English and Welsh bankruptcy law is not yet written"2019 ICCLRD, 30(9) 473-489. The title of his article is a deliberate echo of Professor Maitland's inaugural essay at Cambridge University, which considered the absence of a written theory of English law.

approach which appears to be currently in place.[2] He too, as indeed do other scholars in the field, laments the absence of a theoretical underpinning to English bankruptcy law, noting, as is well known, Sir Kenneth Cork's lack of interest in any theories in his *Report of the Review Committee on Insolvency Law and Practice*, and the absence of any reference to theories in the White Papers leading up to the Insolvency Act 1986 or the Enterprise Act 2002.

My approach is that while these reasons for the absence of such a theory of English and Welsh bankruptcy law are correct, the wider question is whether having a theory would actually make any difference. Just because some people would like there to be a theory does not mean that we have to have one, or that if there were one it would make any difference. In the practicalities of government, would legislators care whether there were a theory or not? In my limited experience of helping shape legislation in precisely this area, as will be discussed later, policy-formers showed no interest in theory, being far more for interested in what worked, while politicians were mostly interested in what induced most political gain, and least political pain, for their party. Tribe suggests that without a theory of bankruptcy law, "legislation and the results that flow from that legislation in terms of policy outcomes are incoherent". Having been closely involved in the production of bankruptcy legislation myself, I do not think the legislation that we produced was incoherent. It works well enough; few laws work perfectly. "Incoherent" is a strong word to use for a process that however well it is drawn up will result in some losers and some winners; over time the winners and losers inevitably change.

But before we even think about theories of bankruptcy law, we have to decide what we mean by a theory, and in what respects a written theory would differ from an unwritten theory.

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[2] Stubbins, "What kind of world are we living in? Creditor wealth maximisation, contractarianism or multiple values in the post-Enterprise Act 2002 insolvency regime?" 2019 Insolv. Int. 32(2), 78-84.

A scientific theory, is one, as Stephen Hawking says, "a good theory if it satisfies two requirements: It must accurately describe a large class of observations on the basis of a model that contains only a few arbitrary elements, and it must make definite predictions about the results of future observations."[3] A good theory should enable you to be sure about the certainty of a future event, as evidenced by past performance of the subject matters of the theory. The theory also ought to explain certain phenomena.

This may be true of a scientific theory. Should a theory about law be any different? One would have thought not, but as there are clearly dozens of theories about law generally, never mind theories of bankruptcy law, it is hard not to suspect that some theories are not so much about establishing certainty in future decision-making, but are instead the advancement of a particular point of view, or at worst a prejudice, that may be applied, with varying degrees of practicality, to certain aspects of the law, or which may help to analyse the deficiencies of any existing rules of law. A good legal theory might, for example, be able to explain why the law is as it is. A Marxist theory of law, for example, might say that much business and property law gives legitimacy to the prevailing values of dominant economic groups. A feminist theory of law might suggest that much law has been drawn up from a male standpoint to maintain male privileges at women's expense.

Other theories of law are not so much a viewpoint but a statement of what some think the law actually is. A positive lawyer's theory of law will say that the law is what statute and case law says it is. A natural lawyer's theory of law will say that law is the expression of inherent rights conferred by God, nature or reason.

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[3] Hawking, Stephen (1988). *A Brief History of Time.*

The problem is that the word “theory” has many uses. Perhaps, then, we need to be clearer in our definitions. Let us put legal theories into different categories, called frameworks.

The first framework is for explanations of what in practice happens in law. These could be called realist frameworks.

The second framework is for explanations of how the current the currrent law arose – with a strong emphasis on history, and on inbuilt advantage for some participants at the expense of others. There is then usually either a philosophical expectation, or a commercial expectation, that in future that advantage should cease and be conferred on other, in the theorist’s view, worthier recipients. This could be called a reconstructionist framework.

The third is the visionary framework. This is where the theorist puts forward his or her ideal form of what the law should be. This looks at the two previous frameworks and building upon them, or possibly even rejecting them, advances a new ideal framework which, in the theorist’s view, would be much better than the existing ones.

These three frameworks tend to slide into each other. The idealist framework is the reconstructionist framework but just taken further forward. Hawkins’s use of the word “theory” relies on the ability to explain future phenomena using the theory. Of these three frameworks, the realist framework is likely to give a reasonable future understanding of who in practice will get what out of a legal dispute. The reconstructionist framework will again broadly indicate who will get what, but will agitate for change to make the future resolution of similar disputes fairer, in the theorist’s view, than the current practice. The idealist

framework gives very little indication of the future resolution, as the whole procedure needs to be started again from scratch and a new and different process started.

How does this apply to bankruptcy law?

Theories of bankruptcy law

As it happens, there are various theories, or models, of bankruptcy law. The best-known ones are the the Creditors Wealth Maximisation, the Creditors' Bargain, and the Multiple Values Approach, followed by Contractarianism. There are other theories or models not addressed here. Not surprisingly, there is no one theory, model or approach that covers all situations. They each have some value, but each one has its drawbacks.

Creditors Wealth Maximisation

Creditors wealth maximisation is an example of the realist framework in operation, and is probably the best known and in practice probably the most followed theory.[4] This is not to say that legislators actively set out to follow this theory. It is more the case that its proponent, Jackson, and his followers looked at the existing law and saw what it did. It seeks the best return possible for pre-insolvency creditors, both secured and unsecured. A standard regime prevents any one creditor benefitting unduly at the expense of others, treats categories of creditors equally, allows for the possibility of the better parts of a business being sold on, and keeps costs down by the application of a clear set of mandatory rules.

It is not difficult to see how this grew out of early bankruptcy laws. A debtor would declare himself bankrupt: an auctioneer would sell all his assets, a trustee would divide the sale

[4] T. Jackson, "Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain" (1982) 91(5) Yale L.J. 857. It was further developed in D. G. Baird and T. Jackson, "Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy" (1984) 51 U. Chic. L. Rev. 97 and in T. Jackson and R. Scott, "On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain" (1989) 75 Va. L. Rev. 115.

proceeds between the various creditors in proportion to their claims, and the debtor would be free to start again in business if he could, subject to any local restrictions. That others might be willing to go along with this would be because one day it might be their turn. Early colonists, settling in far-flung parts of the world and adopting a capitalist system and having to make their own laws from scratch, would probably have drawn up a similar process.

Its deficiency is that it takes little account of the wider public interest, tort victims, employees, the debtor's family, or the debtor's behaviour. The rules do not differentiate between a debtor who was bankrupted through no fault of his own and the debtor who callously defrauded his creditors. Nor does it distinguish between a debtor running a business who probably could start again, and perhaps even pay something towards his creditors, and a debtor living on benefits who may never be able to hold down a job. Involuntary non-financial creditors, such as a polluted environment, are not generally able to make a claim on the debtor's estate. It does not take account of the needs of post-insolvency creditors. It is also a sudden-death process: you are either bankrupt or you are not. There is no possibility of a moratorium, while the debtor's affairs are sorted out and creditors' claims postponed, until the debtor gets on his or her feet again.

The Creditors' Bargain

The creditors' bargain approach, which is also an example of the realist framework, starts with the premise that creditors agree, or accept, before dealing with a debtor that if the debtor fails, each creditor will be repaid, so far as possible, in accordance with predetermined statutory priorities and contractual agreements. In this respect it is not greatly different from the creditors wealth maximisation approach, but it assumes that all creditors "agree" or accept their respective risks, and that they willingly and knowingly enter into contracts with the debtor and each other. While it is true that various secured creditors may, as in a ranking

agreement or deed of priority, agree beforehand who will get what in the event of the debtor's insolvency, it is not generally the case that creditors either sit around with each other agreeing their respective claims against the debtor or are aware of other creditors' contractual agreements with the debtor. Many creditors may not even known of the existence of other creditors, let along the terms of those other creditors' contracts with the debtor. HMRC does not knowingly and willingly enter contracts with debtors or the other creditors. On the other hand, creditors will know that they will be repaid according to predetermined statutory priorities, and to some extent they agree to that by contracting within a legal system that allows for such priorities.

A variation of the Creditors' Bargain, and perhaps an example of the reconstructionist framework, is that although debtors and creditors agree that they will submit to being repaid in accordance with the predetermined statutory priorities, creditors nevertheless will self-interestedly jockey amongst themselves to advance themselves within the order of priorities (ideally at others' expense), perhaps by seeking to change the legislation, or persuading the courts that the existing case law should be changed to their advantage.[5] As an example of the former, administrative receivership prior to the Enterprise Act 2002 conferred an enormous advantage to the floating charge holder, at the expense of most unsecured creditors. While this may have seen to be rent-seeking by banks, banks justified their privileged position by claiming to charge lower interest rates than might otherwise have been the case. Nevertheless over time the interest of unsecured creditors and employees was considered more worthy than preserving banks' privileges. Under the Enterprise Act 2002 qualifying floating charges were introduced by the then Labour government in the hope the prescribed part would go some way to protect unsecured creditors' needs,[6] and that administrators would make more effort

[5] F. Tung and M. J. Roe, Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain 99 (2013) Virginia Law Review 1236 (2013).

[6] There appears to be little evidence that this worthy objective was achieved: S. Frisby, Report on Insolvency Outcomes: Presented to the Insolvency Service (26 June 2006), pp.55-56; P. Walton and C. Umfreville, Pre-

than administrative receivers to rescue companies, and thus keep employees in jobs. The employees might then be grateful to the political administration that had looked after their interests. After all, employees vote in elections, and creditors cannot.

The change was indeed at the banks' expense, so as an inducement to get the banks to accept the change, the favoured position of HMRC in administrative receivership was reduced. Ultimately the change was at taxpayers' expense.

As an example of changing the case law, the Scottish law on the equivalent of transactions at an undervalue was overturned in the case of *Macdonald v Carnbroe Estates*[7] where it was established that a creditor who shortly before the debtor company's liquidation had in good faith paid less than full value for an asset belonging to the debtor, and who accordingly was required to required to return it to the liquidator,[8] was entitled to claim in the liquidation, but not as a postponed creditor, as had previously been the case. This overturned many years' worth of previous decisions and introduced a degree of judicial discretion not previously evident.

The creditors' bargain theory, as varied, certainly is also quite close to what happens in real life. Even as varied, though, it suffers from many of the same faults as the creditors wealth maximisation approach.

The Multiple Values Approach

This theory, advanced by Senator Warren, one of the former contenders for the Democratic leadership in the USA, is very different.[9] It is an example of a visionary framework. Instead of pre-insolvency creditors dominating the proceedings, each insolvency should be assessed

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Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration (Final Report to the Graham Review, April 2014); K. Akintola, 'What is left of the Floating Charge?An Empirical Outlook' (2015) 7 JIBFL 404.

[7] [2019] UKSC 57.

[8] As required by 242(4)(b) of the Insolvency Act 1986.

[9] E. Warren, "Bankruptcy Policy" (1987) 54 U. Chic. L. Rev. 775.

individually, with the debtor's losses being accepted by those who can afford to bear them while his assets are distributed amongst those who most need them. This idealistic approach, commendable in terms of social justice, but probably difficult to operate in practice, appears not to have been adopted anywhere, not least because it is would be expensive and, unpredictable. Who decides who is best able to bear losses or most deserving to receive assets, and what criteria would be used? Would it help rescue businesses? How would it deal with fraud? What does it do to the cost of money? If a country adopted this process, why would anyone lend money in that country at all? The approach assumes that creditors would be unnaturally self-denying and willing to accept losses for the greater good, something probably only possible in a small and altruistic society or a closed religious or social community. For that very reason, it is impractical, unrealistic and unlikely ever to be used.

Contractarianism and communitarianism.

This is a sort of half-way house between Creditor Wealth Maximisation and the Multiple Values Approach. Contractarianism assumes that most people essentially are self-seeking and will try to optimise their own benefits, but can be persuaded to forgo their total self-interest by accepting some legal or moral constraints on their own behaviour, provided the same is expected of others.[10] The idea is the net end result of universal acceptance of this social contract over time is more profitable than trying, and sometimes failing, to maximise one's own return on every occasion. Communitarianism is a more public-spirited version of the same thing, with less emphasis on the individual and more on the collective benefit of and the moral expectation of being a good citizen. Were contractarianism to be applied to bankruptcy law, the range of claimants on the debtor's estate might not be limited to pre-insolvency

[10] D. Korobkin, "Contractarianism and the Normative Foundations of Bankruptcy Law" (1993) 71 Texas L. Rev. 541; D. Korobkin, "The Role of Normative Theory in Bankruptcy Debates" (1996–7) 82 Iowa L. Rev. 75.

creditors and involuntary creditors would receive more representation, but there would not be the free-for-all of the Multiple Values Approach: there would need to be statutory rules capable of enforcement. If communitarianism were to be applied to bankruptcy law, there would be probably be more attention paid to preventing people becoming bankrupt, either by educating them or looking after them better, or making creditors be more responsible in how they offer credit. Either way, there would be rules, and while having rules is to be welcomed, since it gives certainty, the bigger question is which post-insolvency creditors can make claims and which involuntary creditors are to receive representation.

The fact that there is no one theory, model or framework that seems to satisfy all requirements, though some get quite close to it, is probably one of the reasons that practitioners and scholars of English and Welsh bankruptcy law do not appear, on the face of it, particularly interested in any overriding theory. If no theory appears to be wholly comprehensive, there is little advantage in using it as the basis of legal decision-making. In the meantime, the law appears to carry on in practice not noticeably suffering from the lack of any overriding theory.

Perhaps the problem is that again the word “theory” is not ideal. Instead, what about seeking some generally accepted bankruptcy principles? A principle is an agreed starting point behind a legal structure. For example, the principle of registration of title is that registration confirms security of ownership, allows for the mortgaging of property and reduces the opportunity for disputes over ownership. Property may or may not be theft - one may or may not agree with the underlying principle of registration - but an edifice of law is still built upon it.

If it is a good principle, it may be transportable to a similar area of law and still be effective. If a set of bankruptcy principles is any good, it could be applied elsewhere. This indeed happened with corporate insolvency law: it was based on personal bankruptcy law. If the set is good, it ought to work in other countries and in other economic circumstances. The application of the set of principles should have predictable outcomes which people can expect to see replicated. And indeed, bankrutpcy and insolvency law is not very different, on the whole, throughout the developed world. The details may differ but the basic concepts remain the same. The range of creditors may slightly differ from country to country, but in practice they are broadly similar.

The need for a set of principles

Tribe's well-made point is that in England and Wales there is no underlying written theory. It is all just legislation "driven by commercial practicalities with almost constant tinkering at the edges or to provide short-term headlines that an issue is being addressed". Tribe believes that the country can do better than this: that there ought to be a proper theoretical background underlying bankruptcy which should be adhered to, and derogation from which would be undesirable. This should be separate from the policy matters that bankruptcy law is designed to deal with, namely asset preservation for creditors, realisation and distribution of assets from the bankrupt's estate, the establishment of priorities amongst creditors and the rehabilitation of the debtor.

Leaving aside theories for the moment, some of Tribe's "policy" matters are actually operational. Asset preservation and asset realisation and distribution are entirely practical matters. There have to be methods of looking after the debtor's estate, and reclaiming it from

those who may have been given it in order to defraud creditors. Trustees in bankruptcy need clear rules within which to operate, transparency and accountability. Statute provides these.

The establishment of priorities

Tribe is entirely right about one policy issue. The pecking order between the different groups of creditors must be a policy decision. At the moment, who gets what is a political decision. An example of this can be seen by the change to preferential creditors in ss.98 and 99 of the Finance Act 2020. HMRC will return to being a preferred creditor in respect of PAYE contributions (and certain other taxes), having not been so since the Enterprise 2002. This is precisely the sort of commercial practicality that Tribe deplores. The Government is short of money and sees this an easy way to get some money back. The fact that this may put up the cost of borrowing or reduce the sums available to other creditors is subsumed to the political exigency. Whether to bring back HMRC as a preferential creditor is a good or a bad thing probably does not matter. The reality is that the Government can do it if it wishes to do so, and even if there were a written theory of bankruptcy law, it would override that theory if it chose to do so.

Nevertheless the establishment of priorities is still important. As Tribe has written elsewhere, certain financial groups have used their muscle to ensure more favourable treatment over others.[11] Secured creditors are favourably placed. The traditional argument was that without good security, there would be no cheap loans, and no loans would mean less commerce. To this it may be replied that banks have to lend to exist as banks, and even if there were no or less priority of repayment, as encompassed by security, banks would still have to make loans in order to make money, albeit perhaps on different terms. While interest on loans continues

[11] J. Tribe, "Policy subversion" in corporate insolvency: political science, Marxism and the role of power interests during the passage of insolvency legislation" 2019 Insolv. Int., 32(2), 59-66.

to be tax-deductible, it is going to remain advantageous to run businesses on borrowed funds, and it would be a bold nation that removed the tax-deductibility of interest. At the moment the finance industry is well placed at the top of the pile on insolvency, and short of a socialist revolution, it is unlikely to relinquish that position. And if it did, it would merely pass on its costs by other means to its customers.

But there are other creditor groups who believe that their position should be better. Some say unsecured creditors should get a better deal (as in the prescribed part carved out of a floating charge). One notices here hints of the Multiple Value Approach. What about the environment? At present, if a quarry company becomes insolvent, so that it cannot maintain its quarries which then become filled with water and are dangerous, why is that liability socialised on insolvency so that the company's problem is now the local authority's, which may not be well placed to deal with the quarries? Under such circumstances, should not the local authority have a broader proportion of the company's assets than it does at present? What about the local community? What about customers? Increasingly customers of large businesses, especially in the holiday industry, or of airlines, seem to think that they have an automatic right to be treated better than other creditors, a right that is not evident in law. Previous generations of consumers might have been willing to take misfortune in their stride, but there are current proposals for changes to the law to protect consumers who have pre-paid for goods to be set aside for them[12] and for retailer insolvency.[13] The retailer is effectively using the prepayments as working capital, though some retailers would argue that unless they were allowed to use those funds as working capital they would not be able to operate at all. Touching as this proposed concern for consumers is, it has to be balanced with the fact that it is a large step to place consumers in a higher place than trade creditors, and that there is a

[12] Law Commission Consumer Prepayments on Retailer Insolvency, Report 368 13 July 2016.
[13] See the Law Commission Consultation Paper 246, Consumer Sales Contracts: Transfer of Ownership 27 July 2020

cost to satisfying many but small consumer claims which, if it resulted in less for trade creditors, would merely result in trade creditors passing on their costs to other consumers. What about employees? Having the employee's preference limited to £800 (a figure unchanged since the Insolvency Act 1986) may seem absurd, but no Government has seen fit to change it. It might also be a good idea to carve out more protection for company employee pension funds.

All these emotive claims on an insolvent person or business may have considerable electoral appeal, but may in practice turn out to be more complex than imagined.

It is correct that there needs to be an informed debate about who should get priority in the event of someone's bankruptcy's or a company's insolvency. This is ultimately a political battle, and it is also a matter of changing perceptions about what is important. Although employees and taxes have been priorities since the Bankruptcy Act 1869, it is only now that customers, pension schemes and the environment are beginning to be seen as equally deserving. It is no accident that these are also probably the most complex creditors for whom to design some form of priority.

What must not be forgotten, however, is that one group's benefit is always at another's loss, sometimes known as a zero-sum game. If the rules are changed to be more beneficial to, say, employees, there will be less for others. You can change the size of the slices of the corporate pie that is the total of an insolvent company's or debtor's assets, but there is no magical method of making the overall pie any bigger.

Other principles: Rehabilitation of the debtor

As for rehabilitation of the debtor, some countries, such as Scotland, the USA and Canada, make some debtors undertake a course of financial education in the hope that if they learned some financial skills they might be less likely to become bankrupt again. As with most such ventures, this probably works well with a few, genuinely committed debtors, and not at all well with the socially irresponsible, or those who are likely always to have trouble managing their own lives. Interestingly, in the US some research was carried out to see what difference, if any, debtor education (which is mandatory as a result of Bankruptcy Abuse Prevention and Consumer Protection Act 2005, which amended the existing Bankruptcy Code to this effect) made to debtors.[14] The study suggested most of the participants interviewed for the study did not find their courses helped them in their financial lives, and that those who did make positive changes to their lives after bankrupcty did so not because of their financial education courses but because of the unpleasant experience of being bankrupt. Only about seven per cent found their courses beneficial in the way Congress had intended. This may reflect wider concerns about the particular Colorado demographic that was surveyed, or the quality of the courses themselves. It may also reflect participants' resentment at being required to undertake the courses as part of their rehabilitation. It is perhaps wise that when Scotland introduced such courses, they were not made mandatory, but only take place where the trustee thinks the debtor would benefit from such a course and the debtor agrees to undertake such a course.[15]

But leaving financial education aside, a formal bankruptcy process does wipe the slate clean. Where a debtor is made bankrupt through no fault of his own, it would be a cruel society that provided no opportunity to start again. No such opportunities arose in previous generations, which led to the use of debtors' prisons, such as the Marshalsea in London, where Charles Dickens's father was incarcerated until such time as his family raised the funds to get him

[14] M.D. Sousa "Just punch my bankruptcy ticket: a qualitative study of mandatory debtor financial education" 2013 Marquette Law Review 97, 391-465.
[15] Bankruptcy (Scotland) Act 2016 s. 117.

out. Nowadays most countries have relatively easy methods of enabling debtors to apply for their own bankruptcy, especially if the debtors are on benefits or have no other obvious methods of ever repaying their debts. Such debtors are known as the "can't pay" debtors. It is arguable that the relative ease of bankruptcy for such debtors may force credit-providers to be more considered in their provision of credit.

At the same time, there are individuals who may be tempted repeatedly to use bankruptcy as a way of avoiding their obligations, sometimes known as the "won't pay" debtors. The unkind would say that for them bankruptcy should be seen as a mark of irresponsibility, fraud or profligacy. Stigma for a few may be the price paid to encourage prudence, maturity and probity for most.

There is no perfect solution to the problem that the law has to cope with both those who cannot pay their debts, and need as much help as society is willing to give them, and with those who have no compunction about not paying their debts and for whom bankruptcy holds no terrors. No legal system will ever manage this balance satisfactorily. Life may be better for bankrupts than in Dickens's day, but few parents would, even nowadays, be thrilled to hear that one of their offspring was proposing to marry a bankrupt.

Underlying principles relating to the debtor

There are some principles, at least as regards the debtor's position. They may be seen in what follows.

Bankruptcy does not necessarily wipe out all debts.

If debtors are earning enough to enable them to do so, they should contribute something towards their creditors' losses. As an example of this, in 2007 the Scottish Parliament enacted the Bankruptcy and Diligence etc (Scotland) Act 2007, which amended the previous law on bankruptcy and on diligence, diligence being the Scottish term for the enforcement of court decrees. The author was the advisor to the Culture and Enterprise Committee of the Holyrood Parliament that scrutinised the then Bill. The Act was the brainchild of the later Lord Wallace of Tankerville, who realised that Scotland's insolvency and debt recovery rules would benefit from being revisited and updated. The Act (and its successor Acts) provided for new and accessible methods of helping debtors apply for their own bankruptcy, or sequestration as it is known. In particular, the various Acts devised a method of enabling debtors to contribute to paying their creditors, where they could, once the debtors had been made bankrupt, or even after the period of their bankruptcy. This is done by applying an algorithm to the debtor's state of affairs, known as the common financial tool, to work out what income the debtor needs to live on and what could be paid, if anything, out of the debtor's income to creditors.[16] Other debts not wiped out are student loans, allegedly because medical students might have chosen to become bankrupt at the end of their studies and then avoided repaying their student loans. Criminal fines and the requirement to aliment (or pay maintenance) to a former spouse or children are also not wiped out.[17] Similar rules apply in most other countries.

A debtor should be allowed the the necessities of life.

Most jurisdictions have provisions to prevent families being thrown out of their houses if a parent became bankrupt, or where this is allowed, it is only allowed within limited circumstances. Most countries allow the debtor some essentials of life, such as basic furniture and kitchenware, and the tools of his trade.

[16] Banktuptcy (Scotland) Act 2016 s.89.
[17] Bankruptcy (Scotland) Act 2016 s.145.

Bankruptcy should not endure for too long

Traditionally, debtors in the UK remained bankrupt for three years. The one year period in English law was introduced by the Enterprise Act 2002 in the fond hope that it would encourage entrepreneurs to start again in business quickly, and that this would be good for the economy. It was thought anomalous to have two different periods of bankruptcy depending on which side of the River Tweed one happened to be, so in 2007 Scotland also shortened its period of bankrutpcy to one year – a superb example of what Tribe calls "commercial practicality". It was thought at the time that the new lesser period of bankruptcy might mitigate the social awkwardness of being bankrupt, and would allow unfortunate but blameless entrepreneurs to start afresh in business. There is no evidence that reducing the period of bankruptcy to one year made much difference to the encouragement of entrepreneurs or to the economy. In Germany bankruptcy can last up to six years, and must be at least three. Many states in the USA have only one year's worth of bankruptcy. Different countries appear to have different views of how long a bankrupt should remain bankrupt, possibly reflecting cultural approaches to financial improvidence.

Underlying expectations relating to creditors

From Roman law, most jurisdictions have adapted the *Actio Pauliana*, which allows for the unwinding of certain voluntary obligations undertaken by the debtor in the period leading up to insolvency. In English law, these are seen in transactions at an undervalue and preferences. In Scotland they are known as gratuitous alienations and unfair preferences. The same view is taken of extortionate credit transactions, payments to pension schemes and payments in

respect of divorce. If any of these have been done to deprive the creditors of sums which they otherwise would have received, they should be rescinded.

Creditors should have the expectation that the trustee or liquidator acts in their collective interests if the debtor or company is insolvent, and the right to replace the trustee or liquidator if that person is being partial or incompetent. Creditors should also expect the trustee to have to be paid for his or her labours, where the State does not take over that responsibility.

Creditors should have the the expectation that they will treated on a par with other creditors of their class, to be paid in full where possible, but rateably otherwise.

What principles would be adopted if we were writing bankruptcy law from scratch?

I venture to suggest that actually we would come up with something very similar to what we already have. The thorny issues are:

(a) How easy should it be to make debtors bankrupt?

(b) How much should debtors contribute out of their income to their creditors?

(c) How much of the debtor's assets should be unavailable to creditors?

(d) To what extent should a debtor's home be subject to bankruptcy procedures?

(e) How does the law deal with pre-insolvency activities designed to thwart creditors?

(f) For how long should debtors be subject to the penalties of bankrutpcy?

(g) Within the different groups of creditors, both pre-insolvency and post-insolvency, who should rank higher than others?

(h) How does the law cope with creditors whose interests are not obviously reducible to monetary sums?

(i) How does the law manage to recover as much as possible from the "won't pay" debtors, while being fair to the "can't pay" debtors?

(j) What protection does there need to be for trustees, and how accountable should they be?

(k) What sanctions should be applied to those who do not follow the rules?

(l) To what extent should moratoria be used to give debtors a breathing-space to sort out their affairs before formal insolvency procedures are started?

One can quibble over the details of all of these, but these practical questions lie at the heart of all developed countries' bankruptcy law. Each country tries to deal with them with varying degrees of success. Some countries are more debtor-friendly than others. Where the law is debtor-friendly, interest rates may be high or much demanded by way of security or guarantees. The perfect balance is unlikely to be found in any jurisdiction in a capitalist society. The law also is always unlikely to be satisfactory for that minority of debtors who, by reason of their lack of mental or physical wellbeing, are not so ill that their affairs can be looked after by another, such as an attorney or a guardian, but not are not well enough to look after their own affairs in a rational manner.

My practical experience of being involved in the reform of the law in Scotland relating to bankruptcy, related above, is that at no stage did anyone in the Scottish Parliament or the Executive express any interest in any theories of bankruptcy law. All they cared about was whether voters would accept what they were proposing in terms of being fair to creditors and

debtors. They wanted creditors to get back a reasonable amount of their potential losses, and they did not want blameless debtors to be treated harshly. It is noticeable that in the recent Law Commission reports on consumer interests in retailer insolvency, there is no reference to any theories of insolvency or bankruptcy either.

Tribe seems to think England and Wales lack a theory of bankruptcy law. While his observations are illuminating, I would suggest that bankruptcy law is pretty similar world-wide; that every developed country will have much the same difficulties; that most countries follow the principles that I have indicated above when drawing up their own laws; that there is nothing so special about England and Wales that it needs its own theory, written or not; that politicians, who at the end of the day are the ones who make the laws, are often indifferent to legal theories; and that judges are not inconvenienced by the absence of theory when making their decisions: they look at what the statute says and do what it says. Bankruptcy law does not need more theory: it just needs some rules that on the whole work reasonably well in most circumstances. It is a noble aspiration to say, as Tribe does, that we could do better. Another way of looking at it is that we have to work with what works, not always prefectly, much of the time, but that given the vagaries of human nature, the existing political process, and the resilience of existing vested interests, change is at best always likely to be tinkering and incremental – exactly as he fears.